

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JACQUELINE STEPHANIE ROYBAL,

Plaintiff,

vs.

No. CIV 13-0910 JB/KBM

SOCIAL SECURITY ADMINISTRATION,

Defendant.

**MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on the Proposed Findings and Recommended Disposition, filed October 1, 2014 (Doc. 31)(“PFRD”), that the Honorable Karen B. Molzen, Chief United States Magistrate Judge prepared pursuant to 28 U.S.C. § 636(b). Plaintiff Jacqueline Roybal objects to Judge Molzen’s conclusion that the Administrative Law Judge (“ALJ”) did not violate her due process rights by limiting the cross-examination of the vocational expert. See Plaintiff’s Objection to the Magistrate Judge’s Proposed Findings and Recommended Disposition, filed October 13, 2014 (Doc. 32)(“Objection”). Having conducted a de novo review of this issue, the Court finds no error in Judge Molzen’s determination that the ALJ properly limited the cross-examination and, therefore, overrules Roybal’s objection.

**LAW REGARDING OBJECTIONS TO PROPOSED FINDINGS AND
RECOMMENDATIONS**

District courts may refer dispositive motions to a magistrate judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1) (“A magistrate judge must promptly conduct the required proceedings when assigned, without the parties’ consent, to hear a pretrial matter dispositive of a claim or defense . . .”). Rule 72(b)(2) governs objections: “Within 14 days after

being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b)(2). Finally, when resolving objections to a Magistrate Judge’s proposal, “[t]he district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

“The filing of objections to a magistrate’s report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties’ dispute.”

United States v. One Parcel of Real Property, with Buildings, Appurtenances, Improvements, and Contents, 73 F.3d 1057, 1059 (10th Cir. 1996)(quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)) (“One Parcel”). As the United States Court of Appeals for the Tenth Circuit has noted, “the filing of objections advances the interests that underlie the Magistrate’s Act, including judicial efficiency.” One Parcel, 73 F.3d at 1059 (citing Niehaus v. Kan. Bar Ass’n, 793 F.2d 1159, 1165 (10th Cir. 1986); United States v. Walters, 638 F.2d 947, 950 (6th Cir. 1981)).

The Tenth Circuit has held “that a party’s objections to the magistrate judge’s report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” One Parcel, 73 F.3d at 1060. “To further advance the policies behind the Magistrate’s Act, [the Tenth Circuit], like numerous other circuits, have

adopted ‘a firm waiver rule’ that ‘provides that the failure to make timely objections to the magistrate’s findings or recommendations waives appellate review of both factual and legal questions.’” One Parcel, 73 F.3d at 1059 (citations omitted). In addition to requiring specificity in objections, the Tenth Circuit has stated that “[i]ssues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.” Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1421, 1426 (10th Cir. 1996)(“In this circuit, theories raised for the first time in objections to the magistrate judge’s report are deemed waived.”). In an unpublished opinion, the Tenth Circuit stated that “the district court correctly held that [a petitioner] had waived [an] argument by failing to raise it before the magistrate.” Pevehouse v. Scibana, 229 F. App’x 795, 796 (10th Cir. 2007)(unpublished).¹

In One Parcel, the Tenth Circuit, in accord with the other United States Courts of Appeals, expanded the waiver rule to cover objections that are timely but too general. See One Parcel, 73 F.3d at 1060. The Supreme Court of the United States -- in the course of approving the United States Court of Appeals for the Sixth Circuit’s use of the waiver rule -- has noted:

¹Pevehouse v. Scibana is an unpublished opinion, but the Court can rely on an unpublished opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A), 28 U.S.C. (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”). The Tenth Circuit has stated:

In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court finds that Pevehouse v. Scibana and Sandoval v. Barnhart, 209 F. App’x 820 (10th Cir. 2006)(unpublished), have persuasive value with respect to a material issue, and will assist the Court in its disposition of this Memorandum Opinion and Order.

It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report. See S. Rep. No. 94-625, pp. 9-10 (1976) ("Senate Report"); H.R. Rep. No. 94-1609, p. 11 (1976), U.S. Code Cong. & Admin. News 1976, p. 6162 ("House Report"). There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate. Moreover, the Subcommittee that drafted and held hearings on the 1976 amendments had before it the guidelines of the Administrative Office of the United States Courts concerning the efficient use of magistrates. Those guidelines recommended to the district courts that "[w]here a magistrate makes a finding or ruling on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time." See Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 24 (1975) (emphasis added) ("Senate Hearings"). The Committee also heard Judge Metzner of the Southern District of New York, the chairman of a Judicial Conference Committee on the administration of the magistrate system, testify that he personally followed that practice. See Senate Hearings at 11 ("If any objections come in, . . . I review [the record] and decide it. If no objections come in, I merely sign the magistrate's order."). The Judicial Conference of the United States, which supported the de novo standard of review eventually incorporated in § 636(b)(1)(C)), opined that in most instances no party would object to the magistrate's recommendation, and the litigation would terminate with the judge's adoption of the magistrate's report. See Senate Hearings at 35, 37. Congress apparently assumed, therefore, that any party who was dissatisfied for any reason with the magistrate's report would file objections, and those objections would trigger district court review. There is no indication that Congress, in enacting § 636(b)(1)(C)), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort. We thus find nothing in the statute or the legislative history that convinces us that Congress intended to forbid a rule such as the one adopted by the Sixth Circuit.

Thomas v. Arn, 474 U.S. at 151-52 (footnotes omitted).

The Tenth Circuit also noted, "however, that '[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.'" One Parcel, 73 F.3d at 1060 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991) ("We join those circuits that have declined to apply the waiver rule to a pro se litigant's failure to object when the magistrate's

order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations.” (citations omitted))). Cf. Thomas v. Arn, 474 U.S. at 154 (noting that, while “[a]ny party that desires plenary consideration by the Article III judge of any issue need only ask,” a failure to object “does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a de novo or any other standard”). In One Parcel, the Tenth Circuit noted that the district judge had decided *sua sponte* to conduct a de novo review despite the lack of specificity in the objections, but the Tenth Circuit held that it would deem the issues waived on appeal because it would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases from other circuits where district courts elected to address merits despite potential application of waiver rule, but circuit courts opted to enforce waiver rule).

Where a party files timely and specific objections to the magistrate judge’s proposed findings and recommendation on “dispositive motions, the statute calls for a de novo determination, not a de novo hearing.” United States v. Raddatz, 447 U.S. 667, 674 (1980). “[I]n providing for a ‘de novo determination’ rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate’s proposed findings and recommendations.” United States v. Raddatz, 447 U.S. at 676 (quoting 28 U.S.C. § 636(b))(citing Mathews v. Weber, 423 U.S. 261, 275 (1976)). The Tenth Circuit requires a “district court to consider relevant evidence of record and not merely review the magistrate judge’s recommendation” when conducting a de novo review of a party’s timely, specific objections to the magistrate’s report. In re Griego, 64 F.3d 580, 583-84 (10th Cir. 1995). “When objections are made to the magistrate’s factual findings based on conflicting testimony or evidence . . . the district court must, at a minimum, listen to a tape

recording or read a transcript of the evidentiary hearing.” Gee v. Estes, 829 F.2d 1005, 1008-09 (10th Cir. 1987).

A district court must “clearly indicate that it is conducting a de novo determination” when a party objects to the magistrate’s report “based upon conflicting evidence or testimony.” Gee v. Estes, 829 F.2d at 1009. On the other hand, a district court fails to meet the requirements of 28 U.S.C. § 636(b)(1) when it indicates that it gave “considerable deference to the magistrate’s order.” Ocelot Oil Corp. v. Sparro Indus., 847 F.2d 1458, 1464 (10th Cir. 1988). A district court need not, however, “make any specific findings; the district court must merely conduct a de novo review of the record.” Garcia v. City of Albuquerque, 232 F.3d 760, 766 (10th Cir. 2000). “[T]he district court is presumed to know that de novo review is required. Consequently, a brief order expressly stating the court conducted de novo review is sufficient.” Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996)(citing In re Griego, 64 F.3d at 583-84). “[E]xpress references to de novo review in its order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise.” Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42, 8 F.3d 722, 724 (10th Cir. 1993). The Tenth Circuit has held that a district court properly conducted a de novo review of a party’s evidentiary objections when the district court’s “terse” order contained one sentence for each of the party’s “substantive claims” and did “not mention his procedural challenges to the jurisdiction of the magistrate to hear the motion.” Garcia v. City of Albuquerque, 232 F.3d at 766. The Tenth Circuit has explained that brief district court orders that “merely repeat[] the language of § 636(b)(1) to indicate its compliance” are sufficient to demonstrate that the district court conducted a de novo review:

It is common practice among district judges in this circuit to make such a statement and adopt the magistrate judges’ recommended dispositions when they

find that magistrate judges have dealt with the issues fully and accurately and that they could add little of value to that analysis. We cannot interpret the district court's statement as establishing that it failed to perform the required de novo review.

In re Griego, 64 F.3d at 584.

Notably, because "Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations," United States v. Raddatz, 447 U.S. at 676 (emphasis omitted), a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate," 28 U.S.C. § 636(b)(1). See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42, 8 F.3d at 724-25 (holding that the district court's adoption of the magistrate judge's "particular reasonable-hour estimates" is consistent with the de novo determination that 28 U.S.C. § 636(b)(1) and United States v. Raddatz require).

Where no party objects to the Magistrate Judge's proposed findings and recommended disposition, the Court has, as a matter of course and in the interests of justice, reviewed the Magistrate Judge's recommendations. In Pablo v. Soc. Sec. Admin., No. CIV 11-0132 JB/ACT, 2013 WL 1010401 (D.N.M. Feb. 27, 2013)(Browning, J.), the plaintiff failed to respond to the Magistrate Judge's proposed findings and recommended disposition, and thus waived his right to appeal the recommendations, but the Court nevertheless conducted a review. See 2013 WL 1010401, at *1, *4. The Court stated that it generally does not, however, "review the PF & RD de novo, because the parties have not objected thereto, but rather review[s] the recommendations to determine whether they are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion." Pablo v. Soc. Sec. Admin., 2013 WL 1010401, at *4. The Court, when there are no objections, does not determine independently what it would do if the issues had come before the Court first, but rather adopts the proposed findings and recommended disposition where "the

Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.”” Pablo v. Soc. Sec. Admin., 2013 WL 1010401, at *3 (alterations omitted)(footnote omitted)(quoting Workheiser v. City of Clovis, No. CIV 12-0485 JB/GBW, 2012 WL 6846401, at *3 (D.N.M. Dec. 28, 2012)(Browning, J.)). See Alexandre v. Astrue, No. CIV 11-0384 JB/SMV, 2013 WL 1010439, at *4 (D.N.M. Feb. 27, 2013)(Browning, J.) (“The Court rather reviewed the findings and recommendations . . . to determine if they are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion. The Court determines that they are not, and will therefore adopt the PFRD.”); Trujillo v. Soc. Sec. Admin., No. CIV 12-1125 JB/KBM, 2013 WL 1009050, at *5 (D.N.M. Feb. 28, 2013)(Browning, J.)(adopting the proposed findings and conclusions, and noting that “[t]he Court did not review the ARD de novo, because Trujillo has not objected to it, but rather reviewed the . . . findings and recommendation to determine if they are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion, which they are not.”). This review, which is deferential to the Magistrate Judge's work when there is no objection, nonetheless provides some review in the interest of justice, and seems more consistent with the waiver rule's intent than no review at all or a full-fledged de novo review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 (“There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate.”). The Court is reluctant to have no review at all if its name is going at the bottom of the order or opinion adopting the Magistrate Judge's proposed findings and recommendations.

ANALYSIS

Roybal contends that the ALJ violated her due process rights by failing to allow her to cross-examine the vocational expert by regarding specific functional limitations in the evidence that were noted by Dr. Cox. Judge Molzen found that the ALJ acted properly in restricting the cross-examination because “counsel was asking the vocational expert to redefine” her residual functional capacity (“RFC”) “based on one physician’s opinion of Plaintiff’s specific functional limitations.” PFRD at 14. In her objection, Roybal disputes that her cross-examination of the vocational expert was designed to “re-formulate” her RFC. Rather, she asserts that she sought to ask “about the effect on the occupational base of certain specific work-related limitations already assessed by Dr. Cox.” Objection at 2. Roybal’s questions, however, related not to the Section III of Dr. Cox’s report that set forth his functional assessment, but to Section I, which merely “record[ed] summary conclusions derived from the evidence in the file.” Administrative Record at 544, filed January 16, 2014 (Doc. 22).² The United States Court of Appeals for the Tenth Circuit’s case law cautions that using raw medical data during the cross-examination of a vocational expert is improper. See Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991).

As Judge Molzen notes, the role of a vocational expert is limited to “determining whether the claimant’s skills acquired during past work would transfer to a category containing the exertional level the administrative law judge has concluded the claimant could perform.” PFRD at 13 (citing Hargis v. Sullivan, 945 F.2d at 1492). A vocational expert may not respond to questions on medical matters or draw conclusions not within their authority. See Hargis v. Sullivan, 945 F.2d at 1492.

²Consistent with the R&R, when citing the sealed Administrative Record, the Court cites to the Administrative Record’s internal pagination, rather than the CM/ECF document number and page.

After determining Roybal's RFC, the ALJ posed a hypothetical to the vocational expert consistent with that RFC. See Administrative Record at 22, 60. While "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision," Gay v. Sullivan, 986 F.2d 1336, 1340 (10th Cir. 1993), "[h]ypothetical questions to a vocational expert need only include those limitations that the ALJ finds are established by substantial evidence," Sandoval v. Barnhart, 209 F. App'x 820, 825 (10th Cir. 2006)(unpublished)(citing Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995)).

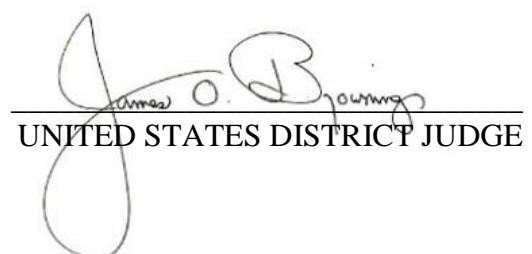
Roybal, apparently, disagreed that the ALJ had included all of her impairments in her RFC, but that did not give her license to question the vocational expert regarding specific raw medical data that is not expressed in terms of an RFC. See Gordon v. Astrue, 249 F. App'x 810, 813 (11th Cir. 2007)(finding a meaningful opportunity for cross-examination where the ALJ restricted the phrasing of claimant's hypothetical question on cross examination so that raw medical data would be expressed in terms of an RFC). Here, the ALJ restricted counsel from asking about the specific functional summary conclusions in Dr. Cox's checkmark-style evaluation form. For example, the ALJ did not permit Roybal to ask the vocational expert to assume that the claimant has "moderate difficulties in maintaining concentration, persistence, or pace" as noted by Dr. Cox on the form. Administrative Record at 63-65. The ALJ allowed Roybal, however, to ask questions regarding concentration, persistence, and pace when they were appropriately phrased. See Administrative Record at 65-67. Accordingly, Roybal was afforded a meaningful opportunity to cross-examine the vocational expert.

Roybal argues that the Tenth Circuit has recognized the importance of checkmark-style forms and cites cases that discuss how checkmark forms are to be used by the ALJ in

determining the RFC. See Objection at 2. Those cases, however, do not support the idea that a claimant's due-process rights are violated when she is not allowed to cross-examine the vocational expert with regard to the checkmark forms. Indeed, the Tenth Circuit has found that “[s]uch [checkmark-style] evaluation forms, standing alone, unaccompanied by thorough written reports or persuasive testimony, are not substantial evidence.” Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987).

In her motion to remand, Roybal successfully argues that the ALJ failed to properly evaluate her treating medical source opinions. See Plaintiff's Motion to Reverse or Remand Administrative Agency Decision, filed March 18, 2014 (Doc. 26). While she did not specifically argue that the ALJ neglected to properly evaluate Dr. Cox's opinion, on remand, as Judge Molzen directed, the ALJ should provide a clear explanation of the weight she gives the medical source opinions, including that of Dr. Cox, and ensure that her RFC -- and hypothetical to the vocational expert at any subsequent hearing -- sufficiently incorporates all of Roybal's impairments. Accordingly, the Court adopts Judge Molzen's findings and conclusions and will remand this case for further proceedings.

IT IS ORDERED that: (i) the Proposed Findings and Recommended Disposition, filed October 1, 2014 (Doc. 31), is adopted; (ii) the Court grants the alternative relief, remand, requested in the Plaintiff's Motion to Reverse or Remand Administrative Agency Decision, filed March 18, 2014 (Doc. 26); and (iii) this case will be remanded to the Commissioner of Social Security upon the Court's entry of final judgment for further proceedings consistent with this Memorandum Opinion and Order.



UNITED STATES DISTRICT JUDGE

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